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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

THE CANADIAN PACIFIC STEAMSHIPS, LTD., and
THE CANADIAN PACIFIC RAILWAY CO.,
Petitioners,

against

EVELYN McAFOOS and WILLIAM NEFF,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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DENNIS P. DONOVAN,

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"Commentary on Maritime Workers" reported immediately prior to the Jones Act in Title 26 U. S. C. A. 688, and particularly at pages 229 through 232 6

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners (hereinafter called defendants) pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled matter on April 2, 1957, reversing the judgment of dismissal of the complaint of respondents (hereinafter called plaintiffs) entered pursuant to the order of the United States District Court for the Southern District of New York.

The Opinions of the Courts Below.

The opinion of the District Court, by Judge Levet, is reported in 143 F. Supp. 73, and is printed in the Appendix hereto (12-16)*. The opinion of the United States Court of Appeals for the Second Circuit, by Judge Clark, is not yet reported, and is printed in the Appendix hereto (17-24).

Jurisdiction.

The judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was entered on April 2, 1957, and is printed in the Appendix hereto (25).

The jurisdiction of this Court is invoked under 28 United States Code, Section 1254 (1).

Questions Presented.

1. Whether plaintiff McAfoos may, in view of the election requirement contained in the Jones Act (46 U. S. C. 688), maintain under that Act two suits for the same relief, one suit being in admiralty and the other being at law.

2. Whether plaintiff McAfoos may, in view of the election requirement contained in the Jones Act, combine under that Act claims predicated on (1) unseaworthiness, and (2) negligence.

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* References herein to the appendix in this court are by page number. References herein to the appendixes in the Court of Appeals (as numbered by the Clerk of that Court) are by page number followed by the letter a.

3. Whether the United States Court of Appeals for the Second Circuit properly held that it is not unduly vexatious to compel the defendants to defend two separate suits in the Southern District of New York commenced by the same plaintiff and predicated on identical causes of action.

Statute Involved.

The statutory provision involved is the Jones Act, 46 United States Code, 688, which provides as follows:

> "Recovery for injury to or death of seaman.
>
> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, §20, 38 Stat. 1185; June 5, 1920, c. 250, §33, 41 Stat 1007."

Statement of the Case.

The complaint herein bases jurisdiction of the District Court on the Jones Act alone (23a). After the District Court rendered its decision, plaintiffs indicated an intent

to amend the complaint so as to allege diversity of citizenship, but no amended complaint has ever been served.

Plaintiffs instituted two actions in the Southern District of New York to recover for the same alleged damages. Suit in admiralty was commenced by filing a libel (13a-17a) on September 21, 1955. Libel was served on the defendants on September 22, 1955 (9a). Subsequently and on October 25, 1955, this civil action was commenced by filing the complaint herein (21a-24a) which complaint was served on defendants on October 26, 1955 (9a).

The allegations of the libel and complaint are substantially identical, each pleading containing the same three claims. The first alleged claim in both the libel and the complaint is by plaintiff, Evelyn McAfoos, who alleges that she suffered personal injury as the result of the alleged negligence of defendants, and the alleged unseaworthiness of the vessel SS. "*Empress of Scotland*". Plaintiff McAfoos alleges she was a member of the crew of the "*Empress of Scotland*" and claims damages in the amount of $150,000.

The second alleged claim in both the libel and the complaint is for $10,000 maintenance and cure alleged to be due plaintiff McAfoos.

The third alleged claim in both the libel and the complaint is by plaintiff William Neff. He alleges that he had a business relationship with Evelyn McAfoos which was curtailed by her injuries caused by defendants' negligence and the unseaworthiness of the "*Empress of Scotland*" as result of which he claims damages in the amount of $15,000.

Defendants moved in the District Court to dismiss the complaint in this action at law on the grounds (a) that the commencement of the suit in admiralty by plaintiffs constituted an election under the Jones Act; (b) that plaintiffs failed to elect between a claim based on unseaworthiness and a claim based on negligence; and (c) that there was

another action pending in the same court for the same relief sought in the complaint (7a-8a). The District Court granted defendants' motion and held that election under the Jones Act meant an election between a suit in admiralty and an action at law; that here such election was made by the plaintiffs when the suit in admiralty was commenced; and that to require the defendants to defend this action at law in view of the identical suit in admiralty would be unduly vexatious (15-16).

The plaintiffs appealed to the United States Court of Appeals for the Second Circuit, which Court reversed the District Court's determination and remanded the action for further proceedings. The Court of Appeals held that while the election referred to in the Jones Act was an election between a suit in admiralty and an action at law, the plaintiffs here did not make such election when they commenced their suit in admiralty, and that the prosecution by plaintiffs of the two actions in the same court was not unduly vexatious (23-24).

Reasons for Granting a Writ.

The important basic question presented by this petition is what specifically is meant by the phrase "at his election" as it appears in the Jones Act. This Court has not passed squarely on this clause. Although this petition does not involve a final judgment, it does present an important and clear-cut issue of Federal law which has not been decided by this Court, as to which there is substantial conflict and confusion in the lower courts, and which issue is fundamental to the further conduct of this case. In these circumstances, even though judgment below is not final, certiorari is proper. *Supreme Court Practice,* Second Edition, Stern and Gressman, page 130.

History of the Problem.

The meaning of the phrase "at his election" contained in the Jones Act has been given different interpretations by various courts. Historically, and prior to the enactment of the Jones Act this Court in the case of *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372 (1918) referred to the election problem later to be created by adding to the rights of seamen the right to sue for personal injury caused by negligence. The *Chelentis* case "pointed the way" to the Jones Act. ["Commentary on Maritime Workers" reported immediately prior to the Jones Act in Title 26 U. S. C. A. 688, and particularly at pages 229 through 232.] In that case the Court said, while construing a "saving to suitors" clause (247 U. S. 372, 384):

> "Plainly, we think, under the savings clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common law standards rather than those of the maritime law."

After the passage of the Jones Act in 1920, it was assumed that the election referred to therein was an election between a claim based on the maritime theory of unseaworthiness and a claim based on the common law theory of negligence. Illustrative cases are:

Panama R. R. Co. v. *Johnson*, 264 U. S. 375 (1924);
Engel v. *Davenport*, 271 U. S. 33 (1926);
Plamals v. *Pinar Del Rio*, 277 U. S. 151 (1928);
Pacific Steamship Co. v. *Peterson*, 278 U. S. 130 (1928).

Thus, in the *Pinar Del Rio* case, this Court said (277 U. S. 151, 156-157):

> "Seamen may invoke, at their election, the relief accorded by the old rules against the ship; or that provided by the new against the employer. But they may not have the benefit of both."

The cases held that the election between an action based on unseaworthiness and an action based on negligence is made when the initial pleading is filed. *Kuhlman* v. *W. & A. Fletcher Co.*, Third Circuit, 20 F. 2d 465 (1927); cf *Skolar* v. *Lehigh Valley Railroad Co.*, Second Circuit, 60 F. 2d, 893 (1932). Thus in the *Kuhlman* case the Court said (20 F. 2d, 465, 467):

> "Having thus elected the statutory remedy by instituting the suit at law, the plaintiff had no right later to amend his pleading and transfer his action from the law side of the Court to its admiralty side. He was bound by his election."

The Third Circuit took the first step in departing from the theretofore accepted concept of the Jones Act election. *McCarthy* v. *American Eastern Corporation*, 175 F. 2d, 724 (1949), Cert. denied, 338 U. S. 868. That case specifically held that the election referred to did not require a choice between the theory of negligence and the theory of unseaworthiness. In reaching its conclusion the Third Circuit Court particularly relied on the case of *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316 (1926), a *res judicata* case wherein this Court never mentioned election. In the *McCarthy* case the Court said (175 F. 2d, 724, 726):

> "In our view the election to which the Jones Act refers is an election of remedies as between a suit in admiralty and a civil action."

The Second Circuit was one of the number of circuits to follow the *McCarthy* case. In the case of *Balado* v. *Lykes Bros. S. S. Co.*, 179 F. 2d. 943 (1950), at page 945, the Second Circuit Court said:

> "In our opinion, election is required by the Jones Act only between a trial by jury and a suit in admiralty. Here that election was made when the plaintiff brought his action at law under the Jones Act."

Thus, although the choice presented by the election was changed by judicial decision in various circuit courts, the requirement that the election be made at the outset of the litigation still appeared firmly established; and the District Courts have so held. *Jonassen* v. *Norwegian American Line*, 105 F. Supp. 510; S. D. N. Y. (1952); *Murphy* v. *American Barge Line Co.*, 93 F. Supp. 653, W. D. Penn. (1950); *Contra*, *Stalker* v. *Southeastern Oil Co.*, 103 F. Supp. 436 Del. (1951). But now, in the case at bar, the Second Circuit appears to have held that the election need never be made so long as there are not two recoveries. Thus according to the court below a seaman may maintain two actions for the same relief, one in law and one in admiralty, and in each action he may base his claim on both unseaworthiness and negligence.

The Decision Below Is Erroneous.

The Second Circuit Court has read out of the Jones Act any requirement of election. This fact is clearly demonstrated by the cases cited and relied upon by the Circuit Court in its decision. The basic reasoning of the Court is that since it has been held that the Jones Act action may be transferred from the admiralty to the law side of

the court, the election between an action at law and a suit in admiralty need not be made at the time the initial pleading is filed. To support the proposition that a Jones Act action can be transferred from the admiralty side to the law side the Court relies on two decisions: *O'Neill* v. *Cunard White Star*, Second Circuit 160 F. 2d, 446 (1947), and *Civil* v. *Waterman S. S. Co.*, Second Circuit 217 F. 2d, 94 (1954). Although in each of those Jones Act cases such a transfer was permitted, the cases are death actions. The Jones Act creates two distinct rights. As to actions for personal injuries it provides in pertinent part:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury****"

A separate and distinct right of action is created for the benefit of personal representatives of the seaman in the event of the wrongful death of the seaman. This portion of the Jones Act which follows the semi-colon in the first sentence thereof provides in pertinent part:

> "in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury****"

It can be readily seen that the death action portion of the Jones Act contains no requirement of an election. In other words, by relying on death action cases to support the proposition that this action could be transferred from the law side to the admiralty side, the Court indicates that the language "at his election" contained in the Jones Act (as to a seaman's action but not as to the personal representative's death action) is mere surplusage and of no effect.

The present construction of the Jones Act made by the Court below which renders meaningless the specific statutory language "at his election" is clearly erroneous. As was said by this Court in *United States v. Menasche*, 348 U. S. 528 (1954) 538-539:

> "'The cardinal principle of statutory construction is to save and not to destroy.' Labor Board *v.* Jones & Laughlin Steel Corp., 301 U. S. 1, 30. It is our duty 'to give effect, if possible, to every clause and word of a statute,' Montclair *v.* Ramsdell, 107 U. S. 147, 152, rather than to emasculate an entire section***."

The Question Is of General Importance.

As pointed out above, page 7, the decision of the Circuit Court in the case at bar is in conflict with the decision of the Third Circuit in the *Kahlman* case as to when election must be made and is also in conflict with the language of this Court in the *Pinar Del Rio* case, and the other cases cited, supra, page 6, as to what election is required by the Jones Act. In addition to these conflicts, the meaning of the Jones Act election requirement is a question of great importance since it involves basic construction of one of the more frequently invoked remedial Federal statutes. From a practical point of view, the apparent elimination of the election requirement by the Circuit Court here could substantially double the large number of Jones Act actions pending. It would be quixotic for a plaintiff's attorney not to invoke every remedy now held available to a plaintiff seaman and to invoke those remedies in both the law courts and the courts of admiralty, for at this stage it would indeed be a rash counselor who would stake a client's rights on any legal opinion as to the election requirements of the

Jones Act. The law on the subject is in flux and the mere existence of that flux could well cause substantial injustice to litigants. The matter should now be set to rest by this Court so as to avoid such consequences.

Conclusion.

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

LIVINGSTON PLATT,
Counsel for Petitioners.

DENNIS P. DONOVAN,
ERNEST S. BALLARD, JR.,
Of Counsel.

APPENDIX.

Opinion of United States District Court, Southern District of New York.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

EVELYN MC AFOOS and WILLIAM NEFF,
Plaintiffs,

against

THE CANADIAN PACIFIC STEAMSHIPS, LTD., and the CANADIAN PACIFIC RAILWAY CO.,
Defendants.

OPINION
Civil 101-218

Appearances:

COOPER, OSTRIN & DEVARCO, Attorneys for plaintiffs, 655 Madison Avenue, New York 21, N. Y., RICHARD GYORY, of Counsel.

BLEAKLEY, PLATT, GILCHRIST & WALKER, Attorneys for Defendants, 120 Broadway, New York 5, N. Y., ERNEST S. BALLARD, JR., of Counsel.

LEVET, D. J.

This is an action under the Jones Act, 46 U. S. C. A. 688, to recover for personal injuries claimed to have been sustained by plaintiff, Evelyn Mc Afoos, as a result of the alleged negligence of the defendants and the unseaworthiness of the vessel, the SS. *Empress of Scotland*. The

complaint also includes a claim for maintenance and cure. Plaintiff Mc Afoos is a magician's assistant, and plaintiff, William Neff, is a magician. They alleged that while they were employed by the defendants as members of the entertainment crew and staff of the SS. *Empress of Scotland*, plaintiff Mc Afoos fell through an open hatch on said vessel. Plaintiff Neff seeks to recover for the curtailment of his business relationship with Evelyn Mc Afoos, alleged to have been caused by defendants' negligence and the unseaworthiness of the aforesaid vessel.

Defendants have moved to dismiss the complaint on the ground that prior to the institution of this action, the plaintiffs had commenced an admiralty action (No. 186-206) against the same defendants for the identical causes of action as alleged herein and that said action is presently pending in this Court. Defendants' motion to dismiss the complaint is predicated on the theory that the commencement of the suit in admiralty by plaintiffs constituted an election of remedies under the Jones Act, and on the further ground that there is another action pending in this Court for the same relief as is sought herein. Plaintiffs argue that no election had been made by them because they did not incorporate the Jones Act in their admiralty suit and that they did not allege in said suit that they were employed by the defendants.

Although plaintiffs contend that in their admiralty suit they have not alleged facts relating to employment, it is clear that they are relying upon an employer-employee relationship in said suit. Plaintiff Mc Afoos alleges in the admiralty suit that she was a member of the entertainment crew and staff of the SS. *Empress of Scotland*, and, in addition to her other claims, she seeks to recover in said suit for maintenance and cure. The right to maintenance and cure is conferred by general maritime law and is contractual in the sense that it has its origin in, and is an incident to, the contract of employment. *Cortes v. Baltimore Insular Line*, 287 U. S. 367. It is a right given by general maritime law in consequence of the seaman's status

under his contract of employment between the seaman and the shipowner. The term "seaman" is not limited to those who can "hand, reef, and steer" and has been extended to include a person employed as an entertainer on board a vessel. *The Sea Lark*, D. C. Wash. 1926, 14 F. 2d 201.

Plaintiffs have also alleged in their admiralty suit a cause of action for negligence on the part of the defendants, their agents and employees. Plaintiffs now claim that they do not rely upon the Jones Act in said suit. It should be observed that, absent the relief provided by the Jones Act, a seaman cannot sue a shipowner in admiralty for negligence. *The Osceola*, 189 U. S. 158.

Manifestly, if plaintiffs are permitted to proceed in both actions, a judgment in one is *res judicata* with respect to the other. *Baltimore SS. Co.* v. *Phillips*, 274 U. S. 316. Plaintiffs cannot expect to obtain a double indemnity by fostering twin actions. The issue presented here, however, is whether plaintiffs are deemed to have elected to pursue their rights in admiralty rather than at law.

The Jones Act, 46 USCA 688, provides that "Any seaman who shall suffer personal injury in the course of his employment may, *at his election*, maintain an action for damages at law, with the right of trial by jury * * *." (Emphasis added.) Prior to the enactment of the Jones Act in 1920, a vessel and its owners were liable in admiralty to seamen who were injured in the service of the ship for their wages, maintenance and cure, and compensation for injuries received as a result of the unseaworthiness of the ship or its equipment. *The Osceola*, 189 U. S. 158. The seamen could not recover an indemnity for the negligence of the master, or any member of the crew, beyond maintenance and cure. *The Osceola*, *supra*. In any personal injury action for damages brought by seamen prior to the Jones Act, the affirmative defenses of assumption of risk, the fellow-servant rule, or contributory negligence, could be availed of by the employer. The Jones Act permits injured seamen, at their election, to maintain an action at law for damages for personal injury caused by the negligence of

the employer and the aforementioned affirmative defenses were abolished. A seaman's right to elect to sue under the Jones Act also extends to suits in admiralty. See *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375.

It is now also well established that a plaintiff may claim damages under the Jones Act for negligence, or under the maritime law for unseaworthiness and that he may join both causes of action in a single suit without being deemed to have made an election between them. *McCarthy* v. *American Eastern Corporation*, 3 Cir. 1949, 175 F. 2d 727; *Balado* v. *Lykes Bros. S.S. Co.*, 2 Cir. 1950, 179 F. 2d 943; *Yates* v. *Dann*, 3 Cir. 1955, 223 F. 2d 64; *Williams* v. *Tide Water Associated Oil Company*, 9 Cir. 1955, 227 F. 2d 791. The election contemplated by the Jones Act is "between a trial by jury and a suit in admiralty". *Balado* v. *Lykes Bros. S.S. Co.*, *supra*, at page 945. Thus, it is said that an injured seaman has three remedies: "(1) In admiralty against the ship, without benefit of the Jones Act; (2) At law against the shipowners and under the Jones Act or any other branch of the maritime law; (3) In admiralty against the shipowners and under the Jones Act or any other branch of the maritime law". *Platt* v. *Chesapeake & O. Ry. Co.*, D. C. Ohio 1948, 82 F. Supp. 968, 974.

In the case at bar the plaintiffs clearly indicated by commencing their admiralty suit that they elected to sue in admiralty against the shipowners rather than at law. Their position is not unlike that of the plaintiff in *Murphy* v. *American Barge Line Co.*, D. C. W. D. Pa. 1950, 93 F. Supp. 653, where an injured seaman instituted a civil action against the owner of a vessel, alleging negligence and unseaworthiness. He thereafter filed a libel against the same owner for the same causes of action as asserted in the civil action. The Court held that the seaman made an election when he commenced his civil action and, therefore, dismissed the admiralty suit. Since the recovery which the plaintiffs seek in this action is identical to that which is sought in their admiralty action, they are deemed to have made their election when they filed their suit in admiralty.

See *Jonassen* v. *Norwegian American Lines, Inc.*, D. C. S. D. N. Y. 1952, 105 F. Supp. 510. To require the defendants to plead to and defend two separate suits commenced by the same plaintiffs against the same defendants predicated on identical causes of action would be unduly vexatious. See *Paluchowska* v. *United States Lines, Inc.* D. C. S. D. N. Y. 1950, 93 F. Supp. 751.

Defendants' motion to dismiss the complaint is, therefore, granted.

Settle order on notice.

Dated: New York, N. Y.
July 5, 1956

RICHARD H. LEVET
United States District Judge

Opinion of United States Court of Appeals, Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 116—October Term, 1956.

(Argued January 10, 1957 Decided April 2, 1957.)

Docket No. 24278

EVELYN MCAFOOS and WILLIAM NEFF,

Plaintiffs-Appellants,

—v.—

THE CANADIAN PACIFIC STEAMSHIPS, LTD., and THE CANADIAN PACIFIC RAILWAY CO.,

Defendants-Appellees.

Before:

CLARK, *Chief Judge*, and LUMBARD and WATERMAN, *Circuit Judges*.

Appeal from the United States District Court for the Southern District of New York, Richard H. Levet, *Judge*.

Evelyn McAfoos, an entertainer aboard the defendants' ocean-going vessel, appeals from a decision, D. C. S. D. N. Y., 143 F. Supp. 73, dismissing her complaint under the Jones Act, 46 U. S. C. §688, on the ground that, since she had filed a libel for the same injuries in the same court a month earlier, she had "elected" to sue in admiralty. William Neff, her employer, also appeals from the same deci-

sion dismissing his derivative claim for business loss caused by Miss McAfoos' injury. Reversed and remanded.

RICHARD GYORY, of Cooper, Ostrin & De Varco, New York City (Sidney Roffman, New York City, on the brief), for *plaintiffs-appellants*.

ERNEST S. BALLARD, JR., of Bleakley, Platt, Gilchrist & Walker, New York City (Dennis P. Donovan, of Bleakley, Platt, Gilchrist & Walker, New York City, on the brief), for *defendants-appellees*.

CLARK, *Chief Judge*:

This is an appeal from a decision, D. C. S. D. N. Y., 143 F. Supp. 73, dismissing an action under the Jones Act, 46 U. S. C. 688, on the ground that there was already pending an earlier instituted libel in admiralty for the same recovery. On this appeal the parties also have presented the issue as one of "election" between a civil action "at law" and a suit in admiralty, although this conceals the more fundamental question of the manner and time in which jury trial is waived.

Plaintiff McAfoos, who was employed as a magician's assistant aboard the vessel "Empress of Scotland," allegedly suffered personal injuries when she fell through an opening in the hold of the vessel while it lay berthed in the Port of New York. She claimed[1] that the boards which normally furnished the deck of the hold had been removed by crew members and not replaced. Thus liability might be predicated on either unseaworthiness or the negligence of the crew members. Although Miss McAfoos enjoyed the social status of a ship's officer, she never signed the ship's articles, was reported to have been listed by the ship as a passenger, and was paid by her employer, co-plain-

[1] More fully disclosed by the affidavits submitted by appellants in the district court on application for reargument, and necessarily before us as "original papers" under our Rule 11(b) and F. R. C. P., rule 75(o). We do not know of any basis for appellees' objection to appellate consideration of these documents.

tiff Neff, rather than by the shipowner. On trial she might be proved to be a seaman, a passenger, or a business invitee.

Her ambiguous legal status and the nature of the accident posed a procedural dilemma for the plaintiff at the threshold of the suit. If it should be held later that she was not a "seaman" she could not avail herself of the Jones Act, e.g., *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187; nor could she recover maintenance and cure, *Calvino* v. *Farley*, D. C. S. D. N. Y., 23 F. Supp. 654. Perhaps, although not a seaman, she could nevertheless hold the shipowners liable for the negligence of the crew or the unseaworthiness of the vessel, i.e., *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406; but no diversity of citizenship was alleged here, and without such an allegation it is not clear whether or not these theories can be pursued in a federal court. See *Troupe* v. *Chicago, Duluth & Georgian Bay Transit Co.*, 2 Cir., 234 F. 2d 253, 257. But in a state court she could not proceed *in rem* against the vessel, e.g., *The Glide*, 167 U. S. 606. If she decided to sue in a federal court, she still would have the choice of a civil action, a suit in admiralty, or both. In admiralty both *in rem* and *in personam* claims could be pursued in the same action, *The Isonomia*, 2 Cir., 285 F. 516, 520; but only in a civil action could she try issues to a jury.

Sensing these doctrinal—or at least semantic—obstacles to easy victory, plaintiff's attorney commenced suit by filing a libel in the federal district court against the vessel and the shipowners, alleging negligence, unseaworthiness, and a claim for maintenance and cure, and describing Miss McAfoos as alternatively a crew member or a business invitee. The Jones Act, although not mentioned by name in the libel, was pleaded, since recovery in admiralty was sought for the negligence of crew members and such recovery would have been impossible without the statute. *Engel* v. *Davenport*, 271 U. S. 33, 36; *Hammond Lumber Co.* v. *Sandin*, 9 Cir. 17 F. 2d 760, 762, certiorari denied 274 U. S. 756. A month later plaintiff's lawyer filed a civil complaint against the shipowners in the same district court,

alleging the same facts and theories; this time the Jones Act was mentioned by name and jury trial was asked on all issues.

Before the defendants filed an answer Judge Levet granted their motion, dismissing the complaint as unduly vexatious and because plaintiff by filing a libel had already irrevocably elected to sue in admiralty instead of at law. D. C. S. D. N. Y., 143 F. Supp. 73. Thus plaintiff was left to proceed solely in admiralty, that is, without jury trial.

Inasmuch as the libel and complaint pending simultaneously in the same court were substantially identical, there was no serious apprehension that the plaintiff sought two trials or two recoveries. In fact plaintiff offered to consolidate the actions for trial, making it clear that the second suit was only a procedural device to preserve jury trial. Perhaps confusion would have been avoided or lessened had plaintiff not filed a complaint, but instead moved to transfer the *in personam* claims to the civil side of the court for trial to a jury. The *in rem* claims and any *in personam* theories not cognizable at law would not be lost by such a transfer, of course, but would be preserved in admiralty; and both sets of claims could be pressed simultaneously at the trial.

Actually the complaint, filed with the court and served on the defendants, gave all concerned adequate notice that plaintiff was seeking jury trial on all possible issues; and it should make no difference under either the Admiralty Rules or the Federal Rules of Civil Procedure whether at that initial stage of pleading plaintiff demanded jury trial by motion to transfer or by what was technically a second action. Hence our inquiry must be whether plaintiff could have preserved jury trial by such a motion at this stage of the action. A long line of decisions has established the propriety of treating cases begun by libels as actions "at law"—or presently "civil actions"—where there is federal jurisdiction to sustain the suit on the civil side, e.g., *In re Confiscation Cases*, 87 U. S. (20 Wall.) 92, 109-110; *U. S. ex rel. Pressprich & Son Co.* v. *James W. Elwell & Co.*, 2 Cir., 250 F. 939, certiorari denied 248 U. S. 564; *Cory Bros. & Co.* v. *United States*, 2 Cir., 51 F. 2d 1010; *Prince*

Line v. *American Paper Exports, Inc.*, 2 Cir., 55 F. 2d 1053; *Troupe* v. *Chicago, Duluth & Georgian Bay Transit Co.*; *supra*, 2 Cir., 234 F. 2d 253, 257 note 5. And we have similarly treated an action begun by a civil complaint as a suit in admiralty. *O'Neill* v. *Cunard White Star*, 2 Cir., 160 F. 2d 446, certiorari denied 332 U. S. 773. This power to shift a case from one "side" of the court to another is not limited to situations where one side has jurisdiction and the other has not, *Civil* v. *Waterman S. S. Corp.*, 2 Cir., 217 F. 2d 94; nor does the district court have unlimited discretion to deny transfer between sides, *O'Neill* v. *Cunard White Star*, *supra*, 2 Cir., 160 F. 2d 446.

Appellee's principal contention is that suits under the Jones Act are not transferable like ordinary suits, because the statute requires an "election" between law and admiralty and this election is made when the plaintiff files his first pleading.[2] Two other district court judges and the judge below have read our opinion in *Balado* v. *Lykes Bros. S. S. Co.*, 2 Cir., 179 F. 2d 943, 945, as approving this construction of the statute. See *Jonassen* v. *Norwegian Am. Line*, D. C. S. D. N. Y., 105 F. Supp. 510; *Murphy* v. *American Barge Line Co.*, D. C. W. D. Pa., 93 F. Supp. 653. But in the *Balado* case we held only that the election contemplated by the statute was between a suit in admiralty and a trial by jury and not, as there contended, between theories of negligence and theories of unseaworthiness. We did not mean to express an opinion as to the precise moment at which the election must be finally made, and the statute is equally silent on the point.

In *O'Neill* v. *Cunard White Star*, *supra*, 2 Cir., 160 F. 2d 446, and *Civil* v. *Waterman S. S. Corp.*, *supra*, 2 Cir., 217 F. 2d 94, we approved the transfer of Jones Act suits from law to admiralty—a result incompatible with the notion that the choice of side of the court is made irrevocably at the first pleading; at least one district court has allowed

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[2] The actual wording of the Jones Act, 46 U. S. C. §688, is: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury * * *."

the identical type of transfer involved here, from admiralty to law. *Nilsson* v. *American Oil Co.*, D. C. S. D. Tex., 118 F. Supp. 482.

The "election" contemplated by the Jones Act is primarily a decision as to the form of trial—whether jury or non-jury. *Bâlado* v. *Lykes Bros. S. S. Co.*, *supra*, 2 Cir., 179 F. 2d 943, 945. Ordinarily in cases transferred from admiralty to law this choice is governed by F. R. C. P., rule 38, treating jury trial as waived unless claimed within ten days after issue is joined. *James Richardson & Sons* v. *Conners Marine Co.*, 2 Cir., 141 F. 2d 226, 230; *United States* v. *The John R. Williams*, 2 Cir., 144 F. 2d 451, 454, certiorari denied *Great Lakes Dredge & Dock Co.* v. *United States*, 323 U. S. 782. Even before the adoption of the Federal Rules the choice between jury trial and trial to the court in transferred cases was not deemed irrevocable until issue was joined. *U. S. ex rel. Pressprich & Son Co.* v. *James W. Elwell & Co.*, *supra*, 2 Cir., 250 F. 939; *Prince Line* v. *American Paper Exports, Inc.*, *supra*, 2 Cir., 55 F. 2d 1053, 1057.

Experience has demonstrated the felicity of the ordinary federal procedure which requires a prompt claim of jury trial or at least shortly after issue is joined to preserve that more cumbersome and calendar-delaying form of trial. See Clark, Code Pleading 113-122 (2d Ed. 1947), and Advisory Committee Note to F. R. C. P. 38. But as there pointed out, under the federal practice and a quite usual state procedure jury trial is not waived by failure to make claim earlier and it may well be unfair, as it is unnecessary, to require earlier action. Such is the case here, where the risk of mistake in choosing a wrong legal theory might be costly indeed.

We think that Congress, by its silence as to the time when "election" must be made, intended that the time for seeking jury trial was to be governed by the ordinary rules of procedure. The opposite construction, accepted by the court below, sets an unnecessary snare for the average lawyer, allowing an initial *faux pas* in this difficult procedural situation to deprive his client of jury trial—a procedural advantage which Congress was most desirous to

extend to seamen. *See Civil v. Waterman S.S. Corp., supra*, 2 Cir., 217 F. 2d 94, 97. A construction which creates unnecessary procedural niceties, even in those cases where it does not work to the seaman's ultimate harm, at best puts a premium on the services of experts familiar with special pleading, increasing both the cost and the delay of litigation under the statute. And potential harm is always lurking.

Appellees direct us to language in some older appellate opinions suggesting that the "election" is made at the time of the complaint. But those cases dealt with a plaintiff's choice between substantive theories and not, as here, with his choice as to the form of trial; and they did not deal with an effort made by the plaintiff after filing his libel, but before the defendant has answered, to alter his original "election." e.g., *Engel v. Davenport, supra*, 271 U. S. 33; *Skolar v. Lehigh Valley R. Co.*, 2 Cir., 60 F. 2d 893; *Hammond Lumber Co. v. Sandin, supra*, 9 Cir., 17 F. 2d 760.

Other cases cited by appellees deal with the situation where one suit has proceeded to judgment before the second action is dismissed. Those cases rest on the theory of *res judicata*, but are inapposite here, since neither present action has reached judgment, e.g., *Baltimore S.S. Co. v. Phillips*, 274 U. S. 316; *Jonassen v. Norwegian Am. Line, supra*, D. C. S. D. N. Y., 105 F. Supp. 510.

Kaldman v. W. & A. Fletcher Co., 3 Cir., 20 F. 2d 465, appears to support the appellees' contention for an early election, although the election there found was between a claim of negligence and a claim of unseaworthiness. How far that part of the opinion is law in that circuit today may be considered doubtful. Compare *McCarthy v. American Eastern Corp.*, 3 Cir., 175 F. 2d 724, certiorari denied *American Eastern Corp. v. McCarthy*, 338 U. S. 868. In any event we have quite clearly held otherwise. *O'Neill v. Cunard White Star, supra*, 2 Cir., 160 F. 2d 446; *Civil v. Waterman S.S. Corp., supra*, 2 Cir., 217 F. 2d 94.

We conclude that until ten days after issue is joined a libelant can transfer part of his suit to the civil side of the district court for jury trial, although it contains a claim

under the Jones Act. Consequently the Jones Act does not require dismissal of the plaintiff's complaint on an "election" rationale. Nor was the complaint unduly vexing to the defendants, who could have moved at any time to consolidate it with the pending libel. Had the two suits been in different courts, dismissal might have been appropriate on such grounds; but even then the trial judge might prefer to transfer one suit under 28 U. S. C. §1404 to the district where the other is pending for consolidation with it.

Our disposition of the case reopens the question of which issues are triable to the jury, which the district court had so abruptly resolved. The Jones Act claim is of course cognizable at law; but there is more difficulty with the counts alleging unseaworthiness, maintenance and cure, and recovery in some capacity other than that of a seaman. Plaintiff has indicated that she will amend her complaint to allege diversity of citizenship, so that we need not here decide whether or not in the absence of such allegations the district court could hear such claims at law on the theory that they were ancillary or pendant to the civil action under the Jones Act and part of the same cause of action. See *Troupe* v. *Chicago, Duluth & Georgian Bay Transit Co.*, *supra*, 2 Cir., 234 F. 2d 253, 258; *Doucette* v. *Vincent*, 1 Cir., 194 F. 2d 834, 840, note 5. We point out only the obvious convenience of a consolidation of the admiralty and civil actions, so that the *in personam* claims may be tried to a jury at the same time that the *in rem* claims are tried to the court. Of course the final rationale for a judgment is for the court, so that there need never be an "election" between legal theories. See *Gins* v. *Mauser Plumbing Supply Co.*, 2 Cir., 148 F. 2d 974, 976. The court, in arriving at its ultimate judgment, will make the choice, dictated naturally only by the principles of substantive law which govern the relief sought.

Miss McAfoos' employer, William Neff, joined in the libel and complaint, seeking recovery of business losses allegedly caused by Miss McAfoos' injury. What has been said of Miss McAfoos' claim applies equally to the derivative claim of her employer.

Reversed and remanded.

Judgment of Reversal of United States Court of Appeals, Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2nd day of April, one thousand nine hundred and fifty-seven.

Present:

HON. CHARLES E. CLARK,
Chief Judge

HON. J. EDWARD LUMBARD

HON. STERRY R. WATERMAN
Circuit Judges.

EVELYN McAFOOS & WILLIAM NEFF,
Plaintiffs-Appellants,

v.

THE CANADIAN PACIFIC STEAMSHIPS, LTD. & THE CANADIAN PACIFIC RR.
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and action remanded in accordance with the opinion of this court; with costs to the appellants.

A. DANIEL FUSARO,
Clerk.